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No. 90-26

IN THE

Supreme Court of the United States

October Term, 1990

MICHAEL BARNES, Prosecuting Attorney of St. Joseph County, Indiana, *et al.*,

Petitioners,

v.

GLEN THEATRE, INC., *et al.*; and DARLENE MILLER, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether nude barroom-style or "go-go" dancing is "speech" protected by the First Amendment?

2. If nude barroom dancing is "speech", whether Indiana's general public indecency law is unconstitutional as applied to such dancing?

LIST OF PARTIES

The following persons and entities were parties to the proceedings in the Seventh Circuit; the petitioners in this Court are in italics, all others are respondents:

NO. 88-3006

Plaintiffs-Appellants: Darlene Miller; JR's Kitty Kat Lounge, Inc.

Defendants-Appellees: Civil City of South Bend, Indiana; *Indiana Alcoholic Beverage Commission;* Charles Hurley, Chief of Police of South Bend Police Department; *Michael P. Barnes, Prosecuting Attorney for St. Joseph County, Indiana; Linley E. Pearson, Attorney General of Indiana.*

NO. 88-3244

Plaintiffs-Appellants: Glen Theatre, Inc.; Gayle Ann Marie Sutro; Carla Johnson.

Defendants-Appellees: Civil City of South Bend, Indiana; Charles Hurley, Chief of Police of South Bend Police Department; *Michael P. Barnes, Prosecuting Attorney for St. Joseph County, Indiana; Linley E. Pearson, Attorney General of Indiana.*

TABLE OF CONTENTS

Page:

Questions Presented i
List of Parties ii
Opinions Below 1
Jurisdiction 2
Constitutional Provision and Statute Involved 2
Statement of the Case 3
Summary of Argument 9

Argument:

I. THE NUDE DANCING OF THE PLAINTIFFS IN THIS CASE IS NOT "SPEECH" WITHIN THE MEANING OF THE FIRST AMENDMENT 12
   A. Whether Conduct is "Speech" is a Factual Inquiry Based on Intent and the Presence of a Reasonably Perceivable, Particularized Message 12
   B. The Nude Barroom Dancing Proffered by the Plaintiffs in this Case is Not "Speech," As it Lacks any Element of Communication 16
      1. The dancing in this case lacks sufficient communicative elements to qualify as "speech" 16
      2. Nude barroom dancing is not "speech" simply because it entertains, or on the basis of the "emotional theme" found by the majority below 18
      3. The First Amendment does not protect the nude dancing in this case on the basis of artistic content 22

II. EVEN IF BARROOM EROTIC DANCING IS "SPEECH", INDIANA'S PUBLIC INDECENCY STATUTE IS VALID AS APPLIED TO SUCH DANCING 26

A. The Language and History of the Statute Show That it is Content-Neutral 27
B. A Generally Applicable, Content-Neutral Criminal Prohibition of Conduct is Valid Regardless of Its Impact on Expressive "Speech" 32
C. To The Extent that the Statute Incidentally Limits the Expression of Erotic Barroom Dancers, it is Valid As it Furthers Important State Interests Unrelated to Suppression of Expression 35
D. The Public Nudity Statute is a Reasonable "Manner" Restriction on Erotic Barroom Dancing 38
Conclusion 41

TABLE OF AUTHORITIES

Cases: *Page*

Ardery v. State, 56 Ind. 328 (1877) 29
Bose Corp. v. Consumers Union, 466 U.S. 485 (1984). 15
Bowers v. Hardwick, 478 U.S. 186 (1986)..... 34
California v. LaRue, 409 U.S. 109 (1972)..... 23, 37
City Counsel of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984)..... 27, 38, 41
City Court of City of Tucson v. Lee, 16 Ariz. App. 449, 494 P.2d 54 (1972) 28
City of Dallas v. Stanglin, 490 U.S. 19, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989)..... 13, 21, 22
City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)..... 27, 40
Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984)..... 11, 15, 16, 28, 38-39
Community for Creative Non-Violence v. Watt, 703 F.2d 586 (D.C. Cir. 1983), *rev'd sub nom. Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984)..... 28, 32
Craft v. Hodel, 683 F.Supp. 289 (D. Mass. 1988).... 30
Douglass v. Hustler Magazine, Inc., 769 F.2d 1128 (7th Cir. 1985), *cert. denied* 475 U.S. 1094 (1986). 25
Employment Division v. Smith, 494 U.S. ____, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)..... 11, 27, 33
Erhardt v. State, 468 N.E.2d 224 (Ind. 1984)..... 4
Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975)..... 23, 37
FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. ____, 110 S.Ct. 768, 107 L.Ed.2d 851 (1990)... 28
Glen Theatre, Inc. v. Civil City of South Bend, 695 F.Supp. 414 (N.D. Ind. 1988)..... *passim*
Glen Theatre, Inc. v. Pearson, 802 F.2d 287 (7th Cir. 1986)..... 5, 17
Hamling v. United States, 418 U.S. 87 (1974)..... 24
Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908)..... 25
Jenkins v. Georgia, 418 U.S. 153 (1974)..... 15, 24
Jennings v. State, 16 Ind. 335 (1861)..... 29
Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) . 14
Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988)..... 33
Miller v. California, 413 U.S. 15 (1973)..... 23, 24, 37
Miller v. Civil City of South Bend, 904 F.2d 1081 (7th Cir. 1990) *(en banc)* ..... *passim*
Miller v. Civil City of South Bend, 887 F.2d 826 (7th Cir. 1989), vacated 904 F.2d 1081 (7th Cir. 1990) *(en banc)*..... 7, 18
Noblett v. Commonwealth, 194 Va. 241, 72 S.E.2d 241 (1952)..... 29
Pope v. Illinois, 481 U.S. 497 (1987)..... 24

Redgrave v. Boston Symphony Orchestra, Inc., 855 F.2d 888 (1st Cir. 1988), *cert. denied* ___ U.S. ___, 109 S.Ct. 869, 102 L.Ed.2d 993 (1989) ... 20
Reynolds v. United States, 98 U.S. 145 (1879) 34
Roth v. United States, 354 U.S. 476 (1957) 23
Sir Charles Sydlyes Case, 83 Eng. Rep. 1146-1147 (K.B. 1663) 28
Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) 14
South Florida Free Beaches v. City of Miami, 734 F.2d 608 (11th Cir. 1984) 30
Spence v. Washington, 418 U.S. 405 (1974) .. 9,13-15,17,24
State v. Baysinger, 272 Ind. 236, 397 N.E.2d 580 (1979), *appeals dismissed sub nom. Clark v. Indiana*, 446 U.S. 931 (1979), and *Dove v. Indiana*, 449 U.S. 806 (1980) 3, 25, 31
Stromberg v. California, 283 U.S. 359 (1931) 13
Texas v. Johnson, 491 U.S. ___, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) 9, 13-17, 27
Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) 13
United States v. Albertini, 472 U.S. 675 (1985) 28, 36, 38, 40
United States v. Eichman, 496 U.S. ___, 110 S.Ct. 2404, 110 L.Ed.2d 287 (1990) 30
United States v. O'Brien, 391 U.S. 367 (1968) ... *passim*
United States v. Slepicoff, 524 F.2d 1244 (5th Cir. 1975), *cert. denied* 425 U.S. 998 (1976) 24
United States v. Twelve 200-Ft. Reels of Super 8 mm. Film, 413 U.S. 123 (1973) 26, 28
Walker v. City of Kansas City, 911 F.2d 80 (8th Cir. 1990) 26
Ward v. Rock Against Racism, 491 U.S. ___, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) 14, 38-40
Winters v. New York, 333 U.S. 507 (1948) 19, 28

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) 19

Constitutions, Statutes, and Rules (Current):

U.S. Const., amend. I ..... *passim*
U.S. Const., amend. XXI 4, 8
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1343(a)(3) 4
28 U.S.C. § 2202 4
42 U.S.C. § 1983 4
Fed. R. Civ. P. 52(a) 15, 16
Ind. Code § 35-45-4-1 ..... *passim*
1976 Ind. Acts ch. 148, §§ 5, 24 29-30

Statutes No Longer In Force:

Ind. Code §35-1-83-3 (1971) 29
Ind. Code §10-2801 (Burns 1933 & 1956 Supp.) 29
Ind. Code §2567 (Burns 1926) 29
1905 Ind. Acts ch. 169, § 461 29
1881 Ind. Rev. Stat. § 1995 29
1879-1881 Ind. Acts ch. 37, § 90 29
1852 Ind. Rev. Stat. (1876 Rev.) pt. III, ch. 8, § 22 29
1852 Ind. Rev. Stat. pt. III, ch. 7, § 22 29
1843 Ind. Rev. Stat. ch. 53, § 81 29
1831 Ind. Rev. Stat. ch. 26, § 60 29

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The *en banc* decision of the Seventh Circuit is reported at 904 F.2d 1081 (Pet. App. 1-109). The vacated panel decision of the Seventh Circuit is reported at 887 F.2d 826 (Pet. App. 112-119). The decision of the district court on remand from the first appeal is reported at 695 F.Supp. 414 (Pet. App. 120-136).

The first decision of the Seventh Circuit remanding the case to the district court is reported at 802 F.2d 287 (Pet.

App. 140-147). The original decision of the district court granting a preliminary injunction on July 26, 1985, and its order making the injunction permanent on October 10, 1985, are not reported (Pet. App. 148-158).

JURISDICTION

The judgment to be reviewed was entered *en banc* on May 24, 1990. (J.A. 31.) No petition to rehear the *en banc* judgment was filed. An earlier panel judgment was entered on October 19, 1989, but was vacated by the order granting rehearing *en banc* on January 9, 1990 (Pet. App. 110-111).

This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1). The petition for certiorari was filed on July 2, 1990, and was granted on October 1, 1990.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The state statute found unconstitutional by the Seventh Circuit, Ind. Code §35-45-4-1, provides in pertinent part:

> (a) A person who knowingly or intentionally, in a public place:
>
> (1) engages in sexual intercourse;
> (2) engages in deviate sexual conduct;
> (3) appears in a state of nudity; or
> (4) fondles the genitals of himself or another person;
>
> commits public indecency, a Class A misdemeanor.

> (b) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state.

STATEMENT OF THE CASE

Divided by a vote of seven to four, the *en banc* Seventh Circuit held that, "as a matter of law, non-obscene nude dancing performed as entertainment is expression and as such is entitled to limited protection under the first amendment." *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1085 (7th Cir. 1990) *(en banc)* (Pet. App. 8). The majority further found Indiana's general public indecency statute, Ind. Code §35-45-4-1, to be unconstitutional as applied to such dancing, concluding that Indiana's "laudable concerns" in prohibiting public nude dancing were insufficient to justify a restriction on the expression involved therein. *Id.* at 1088-1089 (Pet. App. 14-16.)

Prior to this litigation, the Indiana Supreme Court held that Indiana's public indecency statute, Ind. Code §35-45-4-1, could constitutionally be used to convict nude barroom dancers. *State v. Baysinger*, 272 Ind. 236, 397 N.E.2d 580 (1979), *appeals dismissed sub nom. Clark v. Indiana*, 446 U.S. 931 (1979), and *Dove v. Indiana*, 449 U.S. 806 (1980). The court construed §35-45-4-1 to proscribe only conduct "traditionally . . . held to be public indecency," but not nudity "as a part of some larger form of expression meriting protection, when the communication of ideas is involved." 397 N.E.2d at 587. Thus construed, the court found that the statute was not overbroad, and further that the nude barroom dancing at issue in the case was mere conduct without the expression of ideas. This Court dismissed appeals from the ruling for want of a substantial federal question. *Clark* and *Dove*, *supra*. The Indiana Supreme Court subsequently affirmed convictions of nude

dancers under the statute. E.g., *Erhardt v. State*, 468 N.E.2d 224 (Ind. 1984).

Filing of Cases and First Appeal. This litigation began with three separate actions filed in the district court in 1985.[1] Glen Theatre, Inc., Gayle Ann Marie Sutro, and Carla Johnson (the *Glen Theatre* plaintiffs) sued the City of South Bend, the city police chief, the county prosecutor, and the state attorney general. Darlene Miller and JR's Kitty Kat Lounge, Inc. (the *Miller* plaintiffs), and Sandy Diamond, Lynn Jacobs, 720 Corporation ("Ramona's Car Wash") and 726 Corporation ("Ace-Hi Lounge") (the *Diamond* plaintiffs), independently sued the above officials and the Indiana Alcoholic Beverage Commission. The plaintiffs sought injunctive relief prohibiting the defendants from enforcing Ind. Code §35-45-4-1 against them on the basis of nude dancing they wished to perform. They claimed that enforcement of the statute, requiring them to wear "pasties" and "g-strings" while dancing, would violate their right to freedom of speech under the First Amendment. It was undisputed that the defendant law enforcement officials had arrested and prosecuted nude dancers under §35-45-4-1, and would do so in the future.

In *Glen Theatre*, District Judge Allen Sharp granted a preliminary injunction against enforcement of the public indecency statute, finding it to be facially unconstitutional for overbreadth. (Pet. App. 149-158.) The injunction was made permanent on October 10, 1985. (Pet. App. 148.) In the *Miller* and *Diamond* cases, District Judge Robert L. Miller, Jr. denied preliminary injunctions after finding that the Twenty-first Amendment permitted the prohibition of nude dancing where alcoholic beverages were sold.

[1]The actions were filed under 28 U.S.C. § 1343(a)(3) (original action to redress deprivation of civil rights) and §2202 (declaratory judgment), and 42 U.S.C. § 1983 (civil rights).

The *Glen Theatre* defendants appealed, and the Seventh Circuit reversed the grant of injunctive relief. *Glen Theatre, Inc. v. Pearson*, 802 F.2d 287 (7th Cir. 1986) (Pet. App. 140). The court found that this Court's dismissal of the appeals from *Baysinger, supra*, for want of a substantial federal question constituted an affirmance of *Baysinger's* holding that the statute was not overbroad. 802 F.2d at 288-290 (Pet. App. 142-146). The case was remanded to the district court for the plaintiffs to pursue their argument that the statute violated the First Amendment as applied to their nude dancing. *Id.* at 290 (Pet. App. 146). The district court was specifically instructed to "examine the plaintiffs' proffered evidence of the dancing they wish to perform" and decide whether "the activity should be afforded First Amendment protection." *Id.* at 291 (Pet. App. 147).

Proceedings and Findings on Remand. After remand the *Miller* and *Diamond* cases were transferred to Judge Sharp, who considered the cases jointly with *Glen Theatre*. The *Miller* and *Diamond* plaintiffs submitted a videotape of four nude dances as evidence of the dancing they wished to perform; the *Glen Theatre* plaintiffs relied only on a previously filed affidavit of Gayle Ann Marie Sutro. Based on the videotape and factual findings previously made in all three cases, the district court denied relief and entered judgment in favor of the defendants. *Glen Theatre, Inc. v. Civil City of South Bend*, 695 F.Supp. 414 (N.D. Ind. 1988) (Pet. App. 120-139). The district court made the following pertinent findings.

Glen Theatre, Inc. ran a business called the "Chippewa Bookstore" offering, among other things, booths with glass panels through which paying adults viewed nude women dancing on a stage. (J.A. 16.) No alcoholic beverages were sold or permitted in the "bookstore." (J.A. 15.) Plaintiff Gayle Ann Marie Sutro in her affidavit described her nude dancing as "an art form I consider to be artistic," and her dances as "appropriately choreographed and . . . an attempt

to communicate as well as entertain." (J.A. 14.) Sutro's appearance was scheduled in conjunction with the showing of one of her movies at the nearby Chippewa Drive-In. (J.A. 14.) As noted, the dancing at the "bookstore" was not represented on the videotape.

The Kitty Kat Lounge sold alcoholic beverages and offered nude "go-go" dancing. The district court described the testimony of plaintiff Darlene Miller at the Kitty Kat as follows:

> Ms. Miller sells drinks and dances at the Kitty Kat. She has worked at the Kitty Kat for about two years and currently makes $250.00 to $300.00 per week. When she dances, Ms. Miller perceives herself as "just entertaining, just dancing." The avowed purpose of her dance is to try to get customers to like her so that they will buy more drinks later. Ms. Miller dances "go-go," sometimes fast, sometimes slow. She dances to music from a juke box. Ms. Miller wants to dance nude because she believes she would make more money doing so; at present, she wears "pasties" and a "g-string" when she dances, for fear of arrest.

695 F.Supp. at 420 (Pet. App. 133).

The third and fourth dancers on the videotape were from the Kitty Kat Lounge.[2] The district court described it as follows:

> The performances are basically identical. They consist of a female, fully clothed initially, who dances to one or more songs as she proceeds to remove her clothing. Each dance ends with the dancer totally nude or nearly nude. The dances are done on a stage or on a bar and are not a part of any type of play or dramatic performance. They are simply what are commonly referred to as "striptease" acts.

[2]Copies of the videotape, showing the third and fourth dancers, have been filed with this Court as a Supplement to the Joint Appendix. The first two dancers and their employers, the *Diamond* plaintiffs, did not appeal from the district court's judgment, and are not before this Court.

695 F.Supp. at 416 (Pet. App. 124).

Based on this evidence, and in accordance with the Seventh Circuit's mandate, the district court found that "the type of dancing these plaintiffs wish to perform is not expressive activity protected by the Constitution of the United States." The court found the dances to be "mere conduct," describing them as "strip tease dances . . . not performed in any theatrical or dramatic context," and further noted that they fell squarely within Indiana's constitutional public indecency statute. 695 F.Supp. at 419 (Pet. App. 130).[3]

Second Appeal. Appeals were taken by the *Glen Theatre* and *Miller* plaintiffs. A panel of the Seventh Circuit[4] reversed the district court on October 19, 1989. The panel ignored the finding which the district court had been instructed to make on remand, and instead held as a matter of law that all non-obscene nude dancing performed for entertainment is "expressive activity" protected by the First Amendment. *Miller v. Civil City of South Bend*, 887 F.2d 826, 827 (7th Cir. 1989) (Pet. App. 112-113).

The state defendants (Barnes, Pearson, and the Indiana Alcoholic Beverage Commission) requested rehearing *en banc;* the Seventh Circuit granted rehearing *en banc* and vacated the panel decision on January 8, 1990. (Pet. App. 110-111.) On May 24, 1990, by a vote of seven to four, the Seventh Circuit again reversed the district court, and enjoined the defendant officials from enforcing the public indecency statute against the plaintiff businesses and danc-

[3]The district court originally found the action to be moot as to the *Glen Theatre* plaintiffs, based on information that their business had been destroyed by fire. 695 F.Supp. at 416 (Pet. App. 124.) Pursuant to a post-judgment motion, however, the district court found that the case was not moot, and made the judgment effective as to the *Glen Theatre* plaintiffs as well. (Pet. App. 136-139.)

[4]The opinion was authored by Judge Flaum and joined by Judges Wood and Coffey.

ers. *Miller v. Civil City of South Bend*, 904 F.2d 1081 (7th Cir. 1990) *(en banc)* (Pet. App. 1 et seq.; judgment at J.A. 31).

The majority held that, "as a matter of law, non-obscene nude dancing performed as entertainment is expression and as such is entitled to limited protection under the first amendment." 904 F.2d at 1085 (Pet. App. 8.) The majority found that the plaintiffs' nude dancing communicated an "emotional" theme of "eroticism and sensuality," 904 F.2d at 1086-1087 (Pet. App. 11), and that the district court's finding of no expression in the dances was "clearly erroneous," *id.* at 1087 n. 5 (Pet. App. 11 n. 5).

The majority further concluded that Indiana's public indecency statute was not a valid restriction on nude barroom dancing, despite the State's "laudable concerns" of protecting public morality in general and family structure in particular. The court found the statute to be "*directly* related to the suppression of free expression" (emphasis in original). The court held, however, that Indiana could regulate the presentation of nude dancing with reasonable time, place and manner restrictions, such as banning nude dancing "in settings such as streets, parks and beaches;" could regulate the conduct for reasons unrelated to the suppression of speech under *United States v. O'Brien*, 391 U.S. 367 (1968); and could regulate nude dancing under the Twenty-first Amendment. 904 F.2d at 1088-1089 & n. 7 (Pet. App. 14-16.)

In dissent, Judge Easterbrook, joined *in toto* by Judges Kanne and Manion and in part by Judge Coffey, found that (1) Indiana's public indecency statute, as a regulation of conduct unrelated to expression, could be constitutionally applied to nude barroom dancing regardless of whether such dancing is speech; and (2) in any event, the nude dancing at issue was not "speech". 904 F.2d at 1120-1131 (Pet. App. 78-100). Judge Coffey joined the first conclusion, and also found that Indiana's legitimate interests in regulating public nudity in general and nude barroom dancing in

particular justified the State's restriction, and that the regulation was a reasonable "manner" restriction on the dancing. 904 F.2d at 1104-1120 (Pet. App. 48-78). Judge Manion, joined by Judges Coffey and Easterbrook, found that (1) the district court properly found that the nude dancing at issue contained no "expressive activity" protected by the First Amendment; and (2) even if expressive, the dancing could be regulated by Indiana's content-neutral statute because the State's interests in preventing public indecency and immorality outweigh any limited First Amendment interest in performing stripteases in bars. 904 F.2d at 1131-1135 (Pet. App. 101-109).

SUMMARY OF ARGUMENT

I. In determining whether conduct is "speech", the Court has used a three-part test to determine whether particular conduct possesses sufficient "communicative elements" to bring it within the Free Speech Clause: (1) Intent to convey (2) a particularized message, and (3) a great likelihood that the message will be understood by viewers. *Texas v. Johnson*, 491 U.S. ____, 109 S.Ct. 2533, 2539, 105 L.Ed.2d 342 (1989); *Spence v. Washington*, 418 U.S. 405, 410 (1974). Applying this test to the nude barroom dancing in this case, it is clear that the Seventh Circuit erred in finding the dancing to be protected "speech" as a matter of law.

Evidence that the dancers intended to communicate was absent. Plaintiff Miller stated that the purpose of her dance was simply to get customers to buy drinks. Plaintiff Sutro claimed that she intended to communicate, but she was unable to articulate any "particularized message." There was no claim whatsoever that a reasonable person viewing the dances would be likely to understand a message. Review of the videotape submitted by the *Miller* plaintiffs confirms that the dancing is empty of any sort of element of

communication, and conduct which does not communicate is not "speech".

The plaintiffs' assertion that the First Amendment protects their dancing because it "entertains" must be rejected, because it would overextend the Amendment to activities (such as bullfighting or circus acts) which have no relation to the need for freedom of speech. The majority below did not adopt a "freedom to entertain," but chose instead to supply a message in the dancing that even the dancers did not assert: an "emotional theme of eroticism and sensuality." This approach is inconsistent with the three-part test set forth above, because it ignores the lack of proof of intent, and because an "emotional theme" is not sufficiently particularized to be "speech".

Works of art are not at risk in this case. Indiana's public indecency statute applies only to live conduct, not books, paintings, or movies. Artistic conduct such as ballet communicates an artistic message (regardless of whether it is bad art or good art) which distinguishes it from the aimless wanderings of nude barroom dancers. The determination of "artistic content" is much like the issue of whether a work lacks serious artistic value in obscenity cases. A precise line need not be drawn in any event, as the majority below conceded that the dancing in this case was "lacking in artistic value." 904 F.2d at 1087 (Pet. App. 12). But the distinction must be recognized, lest the First Amendment be trivialized by including within its protection conduct which is clearly devoid of artistic content.

II. Even assuming *arguendo* that the plaintiffs' erotic dancing is "speech", Indiana's requirement that minimal clothing be worn in public (whether one is dancing or not) may be validly applied to the nude barroom dancing in this case. The public indecency statute, which has roots in common law and a history which far predates barroom nude dancing, is content-neutral — it applies equally to all public nudity regardless of the viewpoint that such conduct might

express. Under any of three possible characterizations of the statute for First Amendment purposes, therefore, the law may be constitutionally applied even to dancing which is "speech".

First, the statute is valid as a general criminal prohibition, and conduct which violates the statute cannot be excused on the ground that the conduct is expressive. For the same reason that an assassin cannot be excused from the operation of a murder statute on the ground that the killing sent a political message, a dancer cannot be excused from the operation of a content-neutral public indecency law on the ground that the dance is expressive. The Court held last Term that Native Americans could be penalized for illegal drug use, even where they claimed that the use of peyote was an essential religious practice. *Employment Division v. Smith*, 494 U.S. ____, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). As in *Smith*, the Court in this case should not engage in any kind of "balancing of interests" to determine the validity of a general criminal proscription.

Second, the statute is valid under the four-part test for regulations of conduct which incidentally infringe on speech, set out in *United States v. O'Brien*, 391 U.S. 367 (1968). The State clearly has the constitutional power to require public decency, and it has "important or substantial . . . interest[s]" in prohibiting public nudity, including nude barroom dancing. Such activity encourages breakdown of the family structure, degradation of women, prostitution, sexual assaults, and other criminal activity. These interests are "unrelated to the suppression of free expression," and the statute's *de minimis* clothing requirement is no greater than necessary to further these interests.

Third, the requirement that certain portions of the body be covered in public is a reasonable "manner" restriction on erotic barroom dancing, an analysis that is practically identical to the *O'Brien* test. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 298 & n. 8 (1984). The

prohibition on nudity is a limitation on the *manner* in which dance (or any other public activity) is performed. The restriction is "justified without reference to the content of the regulated speech" as it is viewpoint-neutral, and the nudity ban is sufficiently tailored to serve the State's interests in public decency. The statute does not unreasonably burden speech or limit alternative avenues for communication, as none of the dancers claimed that nudity *per se* was essential to any message supposedly sent by their dancing.

ARGUMENT

I. THE NUDE DANCING OF THE PLAINTIFFS IN THIS CASE IS NOT "SPEECH" WITHIN THE MEANING OF THE FIRST AMENDMENT.

The district court in this case made a factual finding that the nude barroom dancing which the plaintiffs wished to perform was not "expressive activity" protected by the First Amendment. 695 F.Supp. at 419 (Pet. App. 130). The Seventh Circuit majority, on the other hand, found the dancing at issue to be "expressive" as a matter of law, although it also found the district court's conclusion to be "clearly erroneous." 904 F.2d at 1085, 1087 n. 5 (Pet. App. 8, 11 n. 5). The Seventh Circuit failed to recognize the factual nature of the determination of whether conduct is "speech" under the First Amendment, and reached the wrong conclusion on this record. Part A discusses the three-part factual test for "speech" which this Court has established, and Part B discusses the application of the test to the evidence in this case.

A. Whether Conduct is "Speech" is a Factual Inquiry Based on Intent and the Presence of a Reasonably Perceivable, Particularized Message.

It is beyond dispute that nonverbal conduct can be "speech," although this Court's precedents deal largely with conduct which expressed an apparently political message. As early as 1931, the Court reversed on First Amendment grounds a conviction of displaying a red flag as a sign of opposition to the government, *Stromberg v. California*, 283 U.S. 359 (1931), and since then has found other forms of conduct to be speech. See, e.g., *Texas v. Johnson*, 491 U.S. ____, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (flag burning); *Spence v. Washington*, 418 U.S. 405 (1974) (exhibition of flag with peace symbol affixed to surfaces); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) (wearing of black armbands); *United States v. O'Brien*, 391 U.S. 367 (1968) (burning of draft card assumed *arguendo* to be "speech").

The Court, however, has "rejected 'the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea.'" *Texas v. Johnson*, 491 U.S. at ____, 109 S.Ct. at 2539, quoting *O'Brien*, 391 U.S. at 376. For example, in assessing whether recreational social dancing is a form of expressive activity protected by the First Amendment, the Court recognized that

> [i]t is possible to find some kernel of expression in almost every activity a person undertakes — for example, walking down the street, or meeting one's friends at a shopping mall — but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.

City of Dallas v. Stanglin, 490 U.S. 19, ____, 109 S.Ct. 1591, 1595, 104 L.Ed.2d 18 (1989).

The Court has therefore used a workable test for determining when conduct becomes "speech", which was summarized in *Texas v. Johnson:*

> In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it."

491 U.S. at ____, 109 S.Ct. at 2539, quoting *Spence*, *supra*, 418 U.S. at 410-411. This test can be divided into three elements: (1) intent to convey (2) a particularized message, and (3) a great likelihood that the message will be understood by viewers. The ultimate question the test seeks to answer is the extent to which the conduct possesses "communicative elements."

The focus on "communication" is natural and necessary, lest the First Amendment be expanded to protect actions (verbal or nonverbal) which have no meaning. Even outside the context of "political" conduct, therefore, the Court has consistently stressed communication as key in determining whether conduct is "speech." Motion pictures, for example, are protected as "a significant medium for the *communication* of ideas." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (emphasis added). Theater productions such as *Hair* are protected, as "theater usually is the acting out — or singing out — of the written word." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-558 (1975). "Music, as a form of expression *and communication*, is protected under the First Amendment." *Ward v. Rock Against Racism*, 491 U.S. ____, ____, 109 S.Ct. 2746, 2753, 105 L.Ed.2d 661 (1989) (emphasis added).

The need for communication to turn mere conduct into "speech" gives life to the second element of the test quoted above, a "particularized message." Obviously the "message" need not be so specific that it can be copied in words, complete with punctuation. But the "particulars" of the message must at least be in commonly understood terms. While First Amendment decisions often refer to "expression," the term is always used in the narrow sense of expressing a message, not in the broader sense of being emotionally "expressive." Otherwise, as Judge Easterbrook pointed out in dissent, the First Amendment would protect all conduct because all conduct expresses some emotion. 904 F.2d at 1124-1125 (Pet. App. 87-89).

The test, and especially the elements of intent of the actor and perception of the audience, is clearly factual in nature. The majority below implicitly acknowledged as much by holding

that the district court's finding was "clearly erroneous," 904 F.2d at 1087 n. 5 (Pet. App. 11), apparently under Fed. R. Civ. P. 52(a)'s standard for review of findings of fact. Intent is ordinarily a matter of credibility, as the only direct evidence of intent is usually the assertion of the person who engaged in the conduct. This Court has expressly relied on and implicitly accredited the testimony of those whose conduct was at issue under the First Amendment. *Texas v. Johnson*, 491 U.S. at ____, 109 S.Ct. at 2540; *Spence*, 418 U.S. at 407-408. But the issue is primarily a function of triers of fact, who are better able to assess the credibility of self-serving claims that otherwise criminal conduct was intended to communicate a message.

Equally factual is the question of the likelihood that the intended message would be understood by others, which depends on whether a reasonable person would have perceived the message intended by the actor under the circumstances. In *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984), the Court asked whether the conduct "would *reasonably* be understood by the viewer to be communicative" (emphasis added). Again, this determination is better made in the first instance by trial judges and juries in particular cases. This is especially true because "the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol." *Spence*, *supra*, 418 U.S. at 410.

Of course, in the area of First Amendment claims, appellate courts have a duty to "make an independent examination of the whole record," even in federal cases controlled by Rule 52(a), *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984); and jury verdicts on issues such as whether a work is "patently offensive" are not preclusive, *Jenkins v. Georgia*, 418 U.S. 153, 160 (1974). However, the factual nature of the three-part test counsels deference at least to findings of historical or subsidiary fact, particularly where issues of credibility and context are involved.

Finally, the burden of proving that conduct is "speech" falls squarely on the proponent.

> Although it is common to place the burden upon the Government to justify impingements on First Amendment interests, it is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies. To hold otherwise would be to create a rule that all conduct is presumptively expressive. In the absence of a showing that such a rule is necessary to protect vital First Amendment interests, we decline to deviate from the general rule that one seeking relief bears the burden of demonstrating that he is entitled to it.

Clark v. CCNV, supra, 468 U.S. at 293 n. 5.

B. The Nude Barroom Dancing Proffered by the Plaintiffs in this Case is Not "Speech," As it Lacks any Element of Communication.

1. *The dancing in this case lacks sufficient communicative elements to qualify as "speech".* The district court made a factual finding in this case that the nude dancing which the plaintiffs wished to perform "is not expressive activity." 695 F.Supp. at 419 (Pet. App. 130). A factual finding can be overturned on appeal only if "clearly erroneous," Fed. R. Civ. P. 52(a), although as noted above independent appellate review is appropriate in First Amendment cases. Regardless of the standard used, however, application of the three-part test discussed above demonstrates that the nude dancing at issue does not possess "sufficient communicative elements" to rise to the level of "speech" protected by the First Amendment.

Intent to communicate is wholly lacking, especially from the evidence submitted by the *Miller* plaintiffs, who never claimed any such intent. Instead, Darlene Miller stated that the purpose of her dancing was "to try to get customers to like her so that they will buy more drinks later," and that she wanted to dance nude to "make more money." 695 F.Supp. at 420 (Pet. App. 133). Without intent to communicate a message, there

cannot be a particularized message (the second element) that is understandable by others (the third).

A review of the two nude dances submitted as evidence by the *Miller* plaintiffs[5] confirms the absence of communication. The women on the tape do nothing more than gradually disrobe while dancing in common freestyle fashion, "with vigor but without accomplishment" according to one judge, 904 F.2d at 1091 (Posner, J. concurring) (Pet. App. 19). The dances are empty of any sort of message, much less a "particularized message." As Miller herself said, the dancing is "just entertaining, just dancing." 695 F.Supp. at 420 (Pet. App. 133).

The *Glen Theatre* plaintiffs, and Gayle Sutro in particular, claimed in conclusory fashion "an intent to communicate as well as to entertain." (J.A. 14.) But unlike Harold Spence in *Spence v. Washington, supra*, or Gregory Johnson in *Texas v. Johnson, supra*, Sutro never revealed *what* she wanted to communicate to the men in booths watching her through glass panels. Like Darlene Miller, Sutro's dancing apparently had at least a commercial purpose, since her appearance was designed to promote one of her movies that was playing at a nearby drive-in theater. (J.A. 14.)

Even assuming a good faith intent to communicate something, Glen Theatre and Sutro failed to provide evidence that her communication could be understood by a reasonable audience. Despite the direction of the Seventh Circuit in the first appeal that the district court examine "evidence of the dancing [the plaintiffs] wish to perform," 802 F.2d at 291 (Pet. App. 147), the *Glen Theatre* plaintiffs offered no videotape or other descriptive evidence. Thus there was a complete lack of

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[5]A single tape of four dances was jointly submitted by the *Diamond* and *Miller* plaintiffs. The third and fourth dancers represented the dancing of the *Miller* plaintiffs, and the copies submitted to this Court with the Joint Appendix contain only those dances. The *Diamond* plaintiffs did not appeal from the district court.

proof on their part that would support a finding of "communicative elements" protected by the First Amendment.[6]

Finally, none of the plaintiffs claimed that the *nudity* of the dancers communicated anything different or more than the dances themselves. The Indiana law at issue, as enforced, allows the plaintiffs to perform their dances with "pasties" covering the dancers' nipples and "g-strings" covering their pubic areas and buttocks. It is difficult to imagine that any "message" communicated by naked women dancing on a bar or stage would be perceived any differently when performed with the scanty attire permitted by the statute.

2. *Nude barroom dancing is not "speech" simply because it entertains, or on the basis of the "emotional theme" found by the majority below.* Throughout this litigation the plaintiffs, and ultimately the Seventh Circuit majority, have attempted to bring nude barroom dancing within the First Amendment by misapplying or avoiding altogether the three-part test for communicative elements set forth above. These attempts demonstrate the need for continuing to strictly require a showing of communicative elements.

The plaintiffs argued below that their nude dancing is protected simply because it is "entertainment," an argument accepted by none of the Seventh Circuit judges, and for good reason. Holding that the First Amendment protects any conduct that a reasonable person might find entertaining would expand the Amendment indefinitely and infinitely; the word "speech" would become meaningless. The new "freedom to entertain" would encompass not only "sports" such as bullfighting, bearbaiting, and cockfighting; it would extend as well to messageless (but possibly entertaining) activities such as professional sports, circus acts, beauty pageants, or standing

[6]The State argued below that the *Glen Theatre* plaintiffs waived their contentions by failing to submit proof. The panel decision rejected this argument in a footnote, 887 F.2d at 829 n. 3 (Pet. App. 117), and the waiver claim was not addressed by the *en banc* majority.

nude on a public beach. Such an expansion of the Amendment would not serve any conceivable policy behind allowing freedom of speech.

The plaintiffs relied below on *dicta* in two cases, *Winters v. New York*, 333 U.S. 507 (1948), and *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). In *Winters* the Court reversed a conviction of possession with intent to sell magazines containing "criminal news, police reports, and accounts of criminal deeds." The Court held such printed materials to be within the First Amendment's freedom of the press (not freedom of speech), rejecting the suggestion that free press protection extends only to the "exposition of ideas" because "[t]he line between the informing and the entertaining is too elusive. . . ." 333 U.S. at 510. It is obvious, however, that *printed* matter "communicates" regardless of whether it posits ideas or merely entertains It is equally obvious that noncommunicative *conduct* is not "speech" solely because it entertains, and *Winters* did not so hold.

The human cannonball in *Zacchini* did not claim that his performance was protected "speech." Instead, he claimed a proprietary interest in his performance based on state law, and the Court agreed that a local television station's free *press* privilege did not allow the station to film and broadcast the entire performance without compensating Zacchini. Therefore the Court's statement that "entertainment, as well as news, enjoys First Amendment protection," 433 U.S. at 578, was not dispositive of any issue before the Court, and cannot be deemed a definitive holding that all entertainment is protected "speech."

The Seventh Circuit majority chose instead to supply a message that was not asserted by any of the plaintiffs:

> The dominant theme communicated here by the dancers is an emotional one; it is one of eroticism and sensuality.
>
> * * *

> As stated above, dance as entertainment inherently embodies the expression and communication of ideas and emotions. . . . Nude barroom dancing, though lacking in artistic value, and expressing ideas and emotions different from those of more mainstream dances, communicates them, to some degree, nonetheless.

904 F.2d at 1086-1087 (Pet. App. 11-12) (footnote omitted). With reference to the three-part test discussed in Part A above, however, this conclusion is erroneous for several reasons.

Most obviously it discards the element of intent by finding a "message" that the dancers themselves did not intend to express. "An act not intended to be communicative does not acquire the stature of First-Amendment-protected expression merely because someone, upon learning of the act, might derive some message from it." *Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888, 895 (1st Cir. 1988), *cert. denied* ____ U.S. ____, 109 S.Ct. 869, 102 L.Ed.2d 993 (1989). In this case, the *Miller* plaintiffs intended by their dancing only to sell drinks and "entertain"; the *Glen Theatre* plaintiffs asserted a general intent to communicate, but could not specify any message. Court-supplied intent expands "speech" as far as the imaginations of judges will allow.

> Even in a quantum-mechanical universe there are reasons, and clever observers can infer messages having nothing to do with the id and the superego. A driver doing 90 in a school zone makes an implicit proposal to change the speeding laws, or comments on the dominance of man over machine, or declaims the low value of children's lives, or advertises the capabilities of the car. So too we attribute to nude dancing a belief in the value of Eros, or a retelling of the Genesis story, or a burst of lustful emotion.

Miller (en banc), supra, 904 F.2d at 1129 (Easterbrook, J. dissenting) (Pet. App. 96).

Second, the "emotional theme" discovered by the Seventh Circuit majority falls far short of the "particularized message" protected by the First Amendment. As noted above, the Amendment cannot be stretched so far as to protect all conduct which expresses emotion, because it is "possible to find some kernel of expression in almost every activity a person undertakes." *Stanglin, supra*, 490 U.S. at ____, 109 S.Ct. at 1595.

No doubt *some* dance is communicative, and the majority below correctly noted its cultural roots. 904 F.2d at 1085-1086 (Pet. App. 8-10). But the majority's encyclopedic definition of dancing was "the art of moving the body in a rhythmical way, usually to music, to express an emotion or idea, to narrate a story, or simply to take delight in the movement itself." *Id.* at 1085 (Pet. App. 9), quoting 16 The New Encyclopedia Britannica 935 (1989). From the body language of a beckoning prostitute to the "organized flasher" suggested by Judge Easterbrook in dissent, 904 F.2d at 1126 (Pet. App. 91), such a definition would grant First Amendment "speech" protection to any rhythmic movement which expresses an "emotional theme" of "eroticism and sensuality."

In his concurring opinion, Judge Posner attempted to distinguish between emotional expression that is protected and that which is not. He drew a distinction between two behaviors, kicking a wastebasket in anger and planting geraniums in a windowbox, both "expressive" of an inner mental state.

> But the expression that is relevant to freedom of speech, and absent when the wastebasket is kicked in private, is the expression of a thought, sensation, or emotion *to another person*. This is a narrower concept of expression than the first but it is of course enormously broad, encompassing not only the geranium example but the whole field of human communication, verbal or nonverbal. We communicate with each

another by dress, grooming, deportment, and gestures, as well as by words.

904 F.2d at 1092 (Posner, J. concurring) (Pet. App. 22) (emphasis in original). Under this analysis the First Amendment would not only protect planting flowers, grooming, or deportment; apparently it would also protect kicking a wastebasket *in public*. Judge Posner conceded that social dancing is not protected, as he must after *Stanglin*, *supra*, but there is no principled explanation for protecting public flower transplantation but not public social dancing.

The requirement of a particularized message perceivable by others excludes all of these examples, as well as barroom nude dancing, from First Amendment protection. Of course, if one kicks a wastebasket on which is displayed a picture of a public official, or plants geraniums during a time of public clamor over a windowbox ordinance, the context in either case would suggest a message that reasonable viewers would understand. But such acts in a context which suggests only a generalized emotion of anger, or an intent to beautify one's home, do not communicate in a sufficiently specific way to qualify as "speech" under the First Amendment. For the same reason, neither does a nude dance whose only message is an "emotional theme" of "eroticism and sensuality" qualify as "speech".

3. *The First Amendment does not protect the nude dancing in this case on the basis of artistic content.* The denial of First Amendment protection to the nude barroom dancing at issue in this case will not threaten the protection afforded to works of art, including music, theater, and ballet. This concern was prominent in the Seventh Circuit majority opinion, 904 F.2d at 1086, 1087 (Pet. App. 10, 11-12), and Judge Posner's concurrence, *id.* at 1093-1096 (Pet. App. 24-31). Concern was also expressed that attempts to distinguish "high" art from "low" entertainment, or to differentiate on the basis of perceived sophistication, are

untenable. 904 F.2d at 1086 (majority), 1089 n. 1 (Cudahy, J. concurring) (Pet. App. 10, 16). These concerns are misplaced.

Much of the art discussed by Judge Posner in particular, such as paintings or prints, as well as films and music, is readily distinguishable from live nude dancing because such art, whether representational or abstract, is not *conduct*. This is an important distinction in this case for two reasons. First, the statute under attack, Ind. Code § 35-45-4-1, prohibits only *live* appearances in the nude, not displays of pictures or films containing nudity. Second, the Court has always recognized that the protection of the First Amendment decreases "as the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes. . . ." *California v. LaRue*, 409 U.S. 109, 117 (1972); see also *Miller v. California*, 413 U.S. 15, 26 n. 8 (1973) (States have "greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior"). As the Court noted in *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 n. 7 (1975),

> [s]cenes of nudity in a movie, like pictures of nude persons in a book, must be considered as a part of the whole work. [Citations.] In this respect such nudity is distinguishable from the kind of public nudity traditionally subject to indecent-exposure laws. See *Roth v. United States*, 354 U.S. 476, 512 (1957) (Douglas, J. dissenting) ("No one would suggest that the First Amendment permits nudity in public places").[7]

[7] In *Roth* Justice Douglas, joined by Justice Black, opined that even obscene speech is protected by the First Amendment. But that opinion was qualified when it came to conduct: "I assume there is nothing in the Constitution which forbids Congress from using its power over the mails to proscribe *conduct* on the grounds of good morals. No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct." 354 U.S. at 512 (1957) (Douglas, J. joined by Black, J. dissenting) (emphasis in original).

Art which largely consists of conduct (such as ballet) can be distinguished from nude barroom dancing because the former expresses an artistic message. Choreography in such instances is carefully planned and executed to tell a story or communicate artistically. The aimless wandering of a naked barroom dancer, on the other hand, does nothing more than arouse sexual urges and sell drinks. Its status as "speech" does not depend on whether it is "bad art" or "good art," for it has no artistic content at all.

There is no reason that state trial and appellate courts would be unable to determine whether a particular nude dance is devoid of artistic content. Essentially the same determination is made in obscenity cases, where one question is "whether the work, taken as a whole, lacks serious literary, *artistic*, political, or scientific value." *Miller v. California*, *supra*, 413 U.S. at 24 (emphasis added). The ability of trial judges and juries to assess whether "a reasonable person would find such value in the material, taken as a whole" was reaffirmed in *Pope v. Illinois*, 481 U.S. 497, 500-501 (1987). Expert witnesses or other evidence can be considered in making this assessment. *Hamling v. United States*, 418 U.S. 87, 108, 125, 127 (1974) (expert witnesses permissible in obscenity prosecution, parties entitled to adduce relevant evidence on issues as in any other case); *Jenkins v. Georgia*, *supra*, 418 U.S. at 158-159 (1974) (relying on critical commentary and awards to assess whether movie was "patently offensive"); *United States v. Slepicoff*, 524 F.2d 1244, 1247-1248 (5th Cir. 1975), *cert. denied* 425 U.S. 998 (1976) (use of experts on issue of redeeming social value in pre-*Miller* case).

Distinguishing between the First Amendment rights of ballet dancers and nude "go-go" dancers is also easier when the crucial role of "context" (taking the "work as a whole") is emphasized. See *Spence*, *supra*, 418 U.S. at 410 (context of activity is important, "for the context may give meaning to the symbol"). A nude "ballet" dance on the bar at the

Kitty Kat Lounge may not be protected, while a "go-go" dance in the course of a protected theater production such as *Hair* or *Oh! Calcutta* might qualify as "speech". The Indiana Supreme Court recognized as much in holding that §35-45-4-1 cannot and does not prohibit "some nudity as a part of some larger form of expression meriting protection, when the communication of ideas is involved." *State v. Baysinger*, 272 Ind. 236, 397 N.E.2d 580, 587 (1979), *appeals dismissed sub nom. Clark v. Indiana*, 446 U.S. 931 (1979), and *Dove v. Indiana*, 449 U.S. 806 (1980).

A precise line between conduct with and without artistic content need not be drawn in this case, for it is apparent that the nude dancing at issue here falls on the "nonart" side of any line that might be drawn. The Seventh Circuit majority noted that the dancing in this case was "lacking in artistic value." 904 F.2d at 1087 (Pet. App. 12). One of the concurring opinions stated that the dances on the videotape were performed "with vigor but without accomplishment," 904 F.2d at 1091 (Posner, J. concurring) (Pet. App. 19); the same judge in another case described topless dancing as "artless." *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1141 (7th Cir. 1985) (dictum), *cert. denied* 475 U.S. 1094 (1986). None of the *Miller* plaintiffs claimed protection on the basis of artistic content, and the conclusory assertion of plaintiff Sutro that her dancing "is an art form I consider to be artistic" (J.A. 14) is an insufficient basis for so finding. And even Sutro made no claim that the *nudity* in her assertedly "artistic" dancing was itself artistic.

To hold that nude barroom dancing must be protected in all events, due to the difficulty in drawing the line between art and nonart, would be an abdication of judicial responsibility. This Court has long acknowledged the danger that rights can "declare themselves absolute to their logical extreme." *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908).

The seductive plausibility of single steps in a chain of

> evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth "logical" extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the "line drawing" familiar in the judicial, as in the legislative process: "thus far but not beyond."

Walker v. City of Kansas City, 911 F.2d 80, 87 (8th Cir. 1990) (plurality), quoting *United States v. Twelve 200-Ft. Reels of Super 8 mm. Film*, 413 U.S. 123, 127 (1973) (footnote omitted). For this reason, the Court should resist the temptation to stretch the First Amendment umbrella over all non-obscene nude dancing simply because it may not be as easy in other cases as it is in this case to identify conduct which is wholly lacking in communicative elements, be it artistic, political, or otherwise.

II. EVEN IF BARROOM EROTIC DANCING IS "SPEECH", INDIANA'S PUBLIC INDECENCY STATUTE IS VALID AS APPLIED TO SUCH DANCING.

Assuming *arguendo* that the erotic *dancing* (nude or not) of the plaintiffs is "expressive" and therefore entitled to some protection as speech under the First Amendment, Indiana's public indecency law is valid as applied to such dancing. At the root of this argument is the fact that the statute does not ban dancing, or even erotic dance or conduct. It simply requires that persons who appear in public places, whether dancing or not, cover their genitals, buttocks, and (in the case of females) nipples.

Depending on how this restriction is characterized, the First Amendment analysis of its application to barroom dancing may differ under this Court's precedents. Three characterizations are possible: (1) The ban on pubic nudity is a general, content-neutral criminal proscription that cannot be avoided simply

because the actor claims that his or her illegal conduct is "speech".[8] (2) The ban on public nudity has an incidental impact on any expression involved in erotic dancing, but is valid because it furthers substantial governmental interests unrelated to suppression of free expression.[9] (3) The ban on public nudity is a reasonable "manner" restriction on erotic dancing.[10]

Under any of these characterizations the statute is valid as applied. However, a threshold determination must be made that the statute is "content-neutral" or "viewpoint-neutral"; that is, that its application does not turn on whether the government disagrees with the message expressed. *City Counsel of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). After establishing that Ind. Code §35-45-4-1 is content-neutral in this respect in Part A, the following sections will show that the statute is valid as applied to barroom erotic dancing regardless of how that application is characterized.

A. The Language and History of the Statute Show That it is Content-Neutral.

In *United States v. O'Brien*, 391 U.S. 367 (1968), the statute prohibiting destruction of draft cards did "not distinguish between public and private destruction, and [did] not punish only destruction engaged in for the purpose of expressing views." *Id.* at 375. The Court found that the statute served important governmental interests "unrelated to the suppression of free expression," *id.* at 377; and distinguished it from a flag statute "aimed at suppressing communication," *id.* at 382. In *Texas v. Johnson*, 491 U.S. ____, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989), the Court stated that while the government has a freer hand in restricting expressive conduct as opposed to written or spoken speech, it

> may not, however, proscribe particular conduct *because* it has expressive elements. "[W]hat might be termed the

[8] See *Employment Division v. Smith*, 494 U.S. ____, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990).
[9] See *United States v. O'Brien*, 391 U.S. 367 (1968).
[10] See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

> more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate *basis* for singling out that conduct for proscription. A law *directed at* the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires."

491 U.S. at ____, 109 S.Ct. at 2540, quoting *Community for Creative Non-Violence v. Watt*, 703 F.2d 586, 622-623 (D.C. Cir. 1983) (Scalia, J. dissenting), *rev'd sub nom. Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (emphasis in original).

Examples of content-neutral restrictions, in addition to the draft card destruction statute in *O'Brien*, include antitrust laws which restrict otherwise protected boycotts, *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. ____, ____, 110 S.Ct. 768, 778-779, 107 L.Ed.2d 851 (1990); a "bar letter" forbidding entry to a military installation for security reasons even for a peaceful protest, *United States v. Albertini*, 472 U.S. 675, 687-688 (1985); and a prohibition of camping in certain parks which results in a ban on "sleep-in" protests, *Clark v. CCNV*, *supra*, 468 U.S. at 295.

Even though Indiana does not record legislative proceedings which might indicate legislative intent, the history of the crime of public indecency is strong evidence that the statute was not intended to discriminate on the basis of viewpoint. The common law roots of the offense of "gross and open indecency" were recognized by this Court in *Winters v. New York*, 333 U.S. 507, 515 (1948). The first public indecency case may have been *Sir Charles Sydlyes Case*, 83 Eng. Rep. 1146-1147 (K.B. 1663), in which the defendant was fined for "shewing himself naked in a balkony, and throwing down bottles (pist in) vi & armis among the people in Convent Garden." *United States v. Twelve 200-Ft. Reels of Super 8 mm. Film*, 413 U.S. 123, 134 (1973) (Douglas, J. dissenting). See also *City Court of City of Tucson v. Lee*, 16 Ariz. App. 449, 494 P.2d 54, 57 (1972) (crime considered *malum*

in se at common law); *Noblett v. Commonwealth*, 194 Va. 241, 72 S.E.2d 241, 243-244 (1952).

The history of Indiana's public indecency statute shows that it far predates barroom nude dancing and was enacted as a general prohibition on public nudity. At least as early as 1831 Indiana had a statute punishing "open and notorious lewdness, or . . . any grossly scandalous and public indecency." 1831 Ind. Rev. Stat. ch. 26, § 60; 1843 Ind. Rev. Stat. ch. 53, §81. By 1852 it had been shortened to "notorious lewdness, or other public indecency," 1852 Ind. Rev. Stat. pt. III, ch. 7, §22. However, the undefined phrase "public indecency" was found to be too vague to state a crime. *Jennings v. State*, 16 Ind. 335 (1861). By 1876 the statute was revised to punish every person who "shall be guilty of notorious lewdness, or who shall, in any public place, make any uncovered and indecent exposure of his or their person." 1852 Ind. Rev. Stat. (1876 Rev.) pt. III, ch. 8, §22.

A brief gap in the statutory history was filled by the Indiana Supreme Court in *Ardery v. State*, 56 Ind. 328 (1877), which held that even though there was no public indecency statute in force at the time, the court could sustain a conviction of exhibition of "privates" in the presence of others. The court traced the offense to Adam and Eve, *id.* at 329-330. Four years later a statute was enacted that would remain essentially unchanged for nearly a century:

> Whoever, being over fourteen years of age, makes an indecent exposure of his person in a public place, or in any place where there are other persons to be offended or annoyed thereby, . . . is guilty of public indecency. . . .

1879-1881 Ind. Acts ch. 37, §90; 1881 Ind. Rev. Stat. §1995. The same statute was re-enacted in 1905, and the language quoted above remained unchanged until it was simultaneously repealed and replaced with the present statute in 1976.[11] 1976

[11] 1905 Ind. Acts ch. 169, §461. The statute was most recently codified as Ind. Code §35-1-83-3 (1971), and in earlier compilations was §10-2801 (Burns 1933 & 1956 Supp.) and §2567 (Burns 1926).

Ind. Acts ch. 148, §§5,24.

In addition to the Indiana statute's history of neutrality in proscribing public nudity of all kinds, the statute's "precise language" also indicates a lack of viewpoint bias. Unlike the flag protection statute at issue in *United States v. Eichman*, 496 U.S. ____, ____, 110 S.Ct. 2404, 2409, 110 L.Ed.2d 287 (1990), which was found to focus on acts disrespectful to the flag, the language of Indiana's public indecency statute is clearly neutral. The statute by its own terms bans *all* nudity in public, along with public displays of sexual intercourse, deviate sexual conduct, or fondling. There is nothing in the statute to suggest that it is directed only at such conduct which expresses a message at all, much less a message with which the State of Indiana disagrees.

Based on the history and language of Indiana's public indecency statute, therefore, it is difficult to understand how the statute could be found to be "aimed at" or "related to the suppression of" speech, unless the Court accepts the view that nudity by itself is expressive "speech" (which even the majority below did not do). The statute by its terms casts an dispassionate eye upon flashers, streakers, nude sunbathers, those who wish to stroll or dance naked down the street, or nudity combined with protected political activity. The woman who dances nude in a bar is treated the same as the woman who sheds her blouse to protest the exploitation of women in bars, without respect to the viewpoints expressed. See *Craft v. Hodel*, 683 F.Supp. 289, 296 (D. Mass. 1988) (women engaged in topless protest opposing "pornography and the exploitation of women"); cf. *South Florida Free Beaches v. City of Miami*, 734 F.2d 608, 609 (11th Cir. 1984) (nude sunbathers claimed message that "the human body is wholesome and that nudity is not indecent"). Moreover, the Indiana Supreme Court has construed the statute so as to limit its scope as applied to "some larger form of expression meriting protection, when the commu-

nication of ideas is involved." *Baysinger, supra*, 397 N.E.2d at 587.

The Seventh Circuit majority erred in finding the statute to be a "ban on nude dancing" which was enacted for "the preservation of a particular set of views; those reflecting the Indiana legislature's view of 'public morality.'" Therefore, the majority reasoned, the statute was directly related to the suppression of the dancers' "contrary" message of eroticism. 904 F.2d at 1088 & n. 7 (Pet. App. 14-15). This is a remarkably narrow view of legislative intent behind a statute for which there is no recorded legislative history, *id.*, particularly where the statute's plain words so broadly include all public nudity and public sexual activity, and where the statute has roots far predating the notion of nude barroom dancing for entertainment.

In lieu of considering the scope of the statute and its history set out above, the Seventh Circuit majority chose to limit the statute's purpose to general remarks of the State's counsel at oral argument regarding "public morality generally, and the family structure in particular." 904 F.2d at 1088 & n. 7 (Pet. App. 14-15). As noted in a concurrence, however, counsel also made more specific suggestions of possible reasons for banning nudity (discouragement of adultery and divorce). 904 F.2d at 1100 (Posner, J. concurring) (Pet. App. 39). And as Judge Coffey pointed out in dissent, any omission of counsel in setting out a comprehensive list of possible legislative reasons at oral argument should not have prevented the majority from acknowledging legislative concerns that "should be self-evident to an educated man or woman." 904 F.2d at 1113-1114 (Pet. App. 66-67).

Having established that Ind. Code §35-45-4-1 is a content-neutral regulation of nudity in public rather than a content-based restriction on dancing, the next question is the standard to apply in assessing the validity of the statute's impact on nude dancing in public. Under any of the

approaches discussed below, the statute's application is valid.

B. A Generally Applicable, Content-Neutral Criminal Prohibition of Conduct is Valid Regardless of Its Impact on Expressive "Speech".

In his dissenting opinion in *CCNV v. Watt*, *supra*, then-Judge Scalia distinguished between spoken or written communication (which he called "speech") and other forms of "expression." Acknowledging that laws directed at "speech" must be justified by the government, he opined that

> a law proscribing conduct for a reason having nothing to do with its communicative character need only meet the ordinary minimal requirements of the equal protection clause. In other words, the only "First Amendment analysis" applicable to laws that do not directly or indirectly impede speech is the threshold inquiry of whether the purpose of law is to suppress communication. If not, that is the end of the matter so far as First Amendment guarantees are concerned; if so, the court *then* proceeds to determine whether there is a substantial justification for the proscription, just as it does in free-speech cases.
>
> Thus, the First Amendment's protection of free *speech* invalidates laws that happen to inhibit speech even though they are directed at some other activity (sound amplification, campaign contributions, littering). The more limited guarantee of freedom of expression, by contrast, does not apply to accidental intrusion upon expressiveness but only to purposeful restraint of expression. It would not invalidate a law generally prohibiting the extension of limbs from the windows of moving vehicles; it would invalidate a law prohibiting only the extension of clenched fists.

703 F.2d at 622-623 (Scalia, J. dissenting) (emphasis in original, footnotes omitted).

A similar analysis was applied by this Court, speaking through Justice Scalia, in an exercise of religion case, *Employment Division v. Smith*, 494 U.S. ____, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). In holding that unemployment benefits could be denied to Native Americans who were fired for using illegal drugs, even though they claimed their drug use was for religious reasons, the Court rejected the contention

> that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons.

494 U.S. at ____, 110 S.Ct. at 1599. The Court also refused to engage in any balancing of the interests involved "to require exemptions from a generally applicable criminal law."

> We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the [compelling governmental interest] test inapplicable to such challenges. The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development."

494 U.S. at ____, 110 S.Ct. at 1603, quoting *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988).

The same analysis applies here, as argued by the four dissenters below. 904 F.2d at 1120-1123 (Easterbrook, J. dissenting) (Pet. App. 79-84). Indiana's public indecency law, like the drug law at issue in *Smith*, is an across-the-board criminal prohibition on a particular form of conduct. Regardless of any motive of a dancer (or flasher, or streaker, or sunbather) to communicate a protected First

Amendment message, that motive does not excuse conduct which would otherwise be generally prohibited. This is particularly so where the "speech" is not the sort of political speech at the core of the First Amendment, and where the prohibited activity is *malum in se*.

In this respect the public indecency statute is no different from laws which prohibit murders, even assassinations which express political messages; no one would seriously suggest that a court should balance the interests involved to uphold a murder statute. It is also irrelevant that the criminal proscription involves "public morals," since all criminal statutes involve morality to some extent. See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (the law "is constantly based on notions of morality"). Certainly Indiana's public nudity prohibition is no less a matter of "morals" than was the law against polygamy in *Reynolds v. United States*, 98 U.S. 145 (1879), or a homicide statute which prohibits ritual human sacrifice.[12]

"Balancing" of interests and determinations of "reasonableness" should also be avoided, at least in the area of content-neutral criminal laws, on the ground of judicial restraint. As argued well in the dissents below,[13] judicial determinations of "reasonableness" permit judges to substitute their views for those of legislatures. This violates

[12]Almost every State has a statute banning public indecency, and in at least 22 States the offense does not require that the victim be offended or unconsenting. (Pet. for Cert. at 13 n. 6.) In their briefs opposing certiorari the respondents attempted to distinguish statutes which require that the indecent exposure be intended to gratify or arouse sexual desire, but it seems that they would be hard-pressed to deny that the nude dancing at issue in this case (with its "emotional theme of eroticism and sensuality") would not satisfy this element. The statutes' use of terms such as "lewd" or "obscene" is largely irrelevant, since those terms are capable of broad or narrow construction by a State's highest court, sometimes in light of constitutional principles.

[13]904 F.2d at 1105-1107 (Coffey, J. dissenting); 1129-1131 (Easterbrook, J. dissenting); 1132-1135 (Manion, J. dissenting) (Pet. App. 48-52, 96-100, 103-109).

the separation of powers when the judge and legislature are established by the same constitution; worse, it sours comity in a federal system when federal judges find that a state legislature's judgment is insufficiently "important" or "reasonable."

For example, the majority below found that Indiana "unquestionably" can ban nude dancing "in settings such as streets, parks and beaches," 904 F.2d at 1088 (Pet. App. 15), but did not explain why that restriction is more "reasonable" than Indiana's ban on nudity in public places such as businesses. A judge might find it more reasonable to *permit* naked strolling in a park, on the ground that such conduct is arguably *less* harmful than concentrating nudity in bars and adult "bookstores"; but that is a judgment for the legislature, not judges. Judge Posner's concurring opinion in this case acknowledged that reasonable people might differ over which is more "ridiculous," First Amendment protection for exposed nipples, or ill-advised attempts to restrict erotic dance. 904 F.2d at 1100 (Pet. App. 38) (Posner, J. concurring).[14]

C. To The Extent that the Statute Incidentally Limits the Expression of Erotic Barroom Dancers, it is Valid As it Furthers Important State Interests Unrelated to Suppression of Expression.

The Seventh Circuit majority suggested that Indiana may regulate nude dancing for reasons unrelated to the suppression of speech under *O'Brien*, *supra*. Under such an analysis, the law penalizing destruction of O'Brien's draft card would be compared with Indiana's penalty on total nudity in a dancer's erotic dance. Assuming that this is a valid analogy, and assuming that the dancing in this case is "speech",

[14]In so doing, Judge Posner also demonstrated the willingness of some judges to mock well-intentioned legislation. *Id.* (expressing lack of admiration for "busybodies," and opining that "[t]he history of censorship is a history of folly and cruelty").

it is clear nonetheless that the public indecency law's incidental impact on that "speech" is valid under *O'Brien*.

The Court in *O'Brien* used a four-part test to determine whether the government's interest in regulating a "non-speech" element (destruction of the draft card there, public nudity in this case) justifies "incidental limitations on expression" (political protest there, erotic message here):

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377; *Albertini*, *supra*, 472 U.S. at 687-688. It is beyond dispute that requiring people to wear clothes in public is within the power of the State, thus leaving only the last three elements at issue.

The common law roots of the crime of public indecency serve to underscore the State's "important or substantial . . . interest" in prohibiting public exposure of genitals, buttocks, and female nipples. With the exception of the small minority who are nudists, few would deny that some level of public modesty is necessary in a society whose family and social structure is based on sexual modesty, not public promiscuity. While reasonable people in our society might differ over the "proper" length of a skirt or coverage afforded by a swimsuit (whether worn by a male or female), the interest of government in drawing a *de minimis* line cannot be doubted.

The interest does not change if the nudity is exhibited before consenting adults in a public bar or "bookstore"; indeed, the State's interests there become more urgent. The public display of nudity naturally encourages activities

which break down the family structure. And as Judge Coffey demonstrated in dissent, public nude dancing is damaging to society and citizens by degrading women as sex objects, encouraging prostitution, increasing sexual assaults, and attracting other criminal activity. 904 F.2d at 1109-1113 (Pet. App. 56-66). His well catalogued support for these legitimate State interests need not be reproduced here.

These interests are "unrelated to the suppression of free expression," unless the right to express an "emotional theme of eroticism and sensuality" includes the right to advocate adultery, licentiousness, prostitution, and other crime. As shown in Part A above, Indiana's restriction on public nudity does not apply only to erotic dancing, but restricts all nudity without bias against the expression of views.

Finally, the statute's incidental restriction on expression is "no greater than is essential to the furtherance of [the State's] interest." It bears repeating here that the Court has recognized that regulations on live conduct are more easily justified than regulations on depictions of conduct. See *California v. LaRue*, 409 U.S. 109, 117 (1972) (First Amendment protection decreases "as the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes"); *Miller v. California*, 413 U.S. 15, 26 n. 8 (1973) (States have "greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior"); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 n. 7 (1975) (scenes of nudity in books and movies distinguishable from "the kind of public nudity traditionally subject to indecent-exposure laws").

It is difficult to imagine a more "incidental" or limited restriction on public nudity than the requirement of "pasties" and a "g-string." None of the plaintiffs testified that their "message" or even alleged artistic effect was impaired

by this *de minimis* regulation. The most honest assessment was probably Darlene Miller's testimony that total nudity sold more drinks. 695 F.Supp. at 420 (Pet. App. 133).

Any suggestion that the scope of the statute could be narrowed even further by creating an exception for establishments which admit only consenting adults must fail for two reasons. First, such an exception reduces the statute's effectiveness in combatting the social ills set out above. As in *Taxpayers for Vincent, supra*, "the substantive evil . . . is not merely a possible by-product of the activity, but is created by the medium of expression itself." 466 U.S. at 810. Second, the First Amendment

> does not bar application of a neutral regulation that incidentally burdens speech merely because a party contends that allowing an exception in the particular case will not threaten important government interests.

Albertini, supra, 472 U.S. at 688. This Court has never required that the governmental interests at stake be implemented by the "least restrictive means." *Id.* at 689; *Ward v. Rock Against Racism*, 491 U.S. ____, ____, 109 S.Ct. 2746, 2757, 105 L.Ed.2d 661 (1989).

D. The Public Nudity Statute is a Reasonable "Manner" Restriction on Barroom Erotic Dancing.

Even in cases where a governmental regulation directly infringes upon expression, the First Amendment permits

> reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."

Ward v. Rock Against Racism, supra, 491 U.S. at ____, 109 S.Ct. at 2753, quoting *Clark v. CCNV, supra*, 468 U.S. at 293. In *Clark*, the Court noted that the four-factor *O'Brien* standard is "little, if any, different" from the time, place and manner inquiry. 468 U.S. at 298 & n. 8. Application of the test to Indiana's public nudity law shows that this is true.

The prohibition on nudity is clearly a limitation on the *manner* in which dance is performed, much like the camping ban limited the manner of the sleep-in demonstration in *Clark v. CCNV*, 468 U.S. at 294, and the volume restrictions limited the manner of the rock music performance in *Ward*, 491 U.S. at ____, 109 S.Ct. at 2753. As noted above, it has not been suggested by the plaintiffs that nudity is essential to the erotic nature of their dancing. But even if it is, that element is subject to regulation. Judge Posner admitted as much in concurrence:

> And while in one sense the Indiana statute imposes an outright ban on an expressive activity rather than merely regulating it, in another sense the statute is a mere, and indeed modest (pun intended), regulation. The statute does not ban striptease dancing; it bans only striptease dancing that ends in nudity, which is so narrowly defined that a woman wearing only tiny "pasties" and a G-string is considered clothed. So perhaps it is merely the *manner* of the striptease that is being regulated, and regulations of time, place and manner of expressive activity are treated more leniently than outright bans.

904 F.2d at 1101 (Pet. App. 41) (emphasis in original).

The nudity regulation is "justified without reference to the content of the regulated speech," even if "it has an incidental effect on some speakers or messages and not others." *Ward*, 491 U.S. at ____, 109 S.Ct. at 2754. For example, even though an adult theater zoning restriction treats certain theaters differently based on the content of the films they exhibit, the city's concern with the "secondary effects" of such theatres provides a content-neutral jus-

tification permissible under the First Amendment. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-50 (1986). Similarly, even though the nudity ban may affect erotic dancing differently than square dancing or ballet dancing, it is *justified* on the basis of the secondary concerns discussed in the preceding section: adultery, prostitution, degradation of women, sexual assault, and other crime.

The same legislative policies support a finding that the nudity ban is narrowly tailored to serve significant or substantial governmental interests. As argued in the preceding section, public decency, whether in bars or bookstores, or on sidewalks or beaches, furthers valid concerns relating to family structure, attitudes toward women, and crime. The ban is tailored narrowly enough to serve these interests, and is not an unreasonable "manner" restriction "simply because there is some imaginable alternative that might be less burdensome on speech." *Ward, supra*, 491 U.S. at ____, 109 S.Ct. at 2757, quoting *Albertini, supra*, 472 U.S. at 689. The least restrictive means is not required, so long as the regulation does not burden "substantially more speech than is necessary to further the government's legitimate interests." *Ward, supra*, 491 U.S. at ____, 109 S.Ct. at 2758. A ban on public nudity even before consenting adults does not burden "substantially more speech" than necessary, and to the contrary is itself necessary to target some of the negative effects of public nudity.

Finally, the minimal requirements of Indiana's public indecency statute do not unreasonably limit alternative avenues for communication, because any alleged "erotic message" of the barroom dancer can be communicated just as effectively in scanty apparel as in total nudity. The plaintiffs in this case have never asserted otherwise. In any event, the "alternative avenues" need not be as fully expressive as the restricted speech would be; the Court has asked only whether the restriction renders "the remaining modes of

communication . . . inadequate." *Taxpayers for Vincent, supra*, 466 U.S. at 812. Nothing in the record suggests that the dancers' alleged "theme" cannot be adequately communicated without total nudity.

Conclusion

The judgment of the Seventh Circuit should be reversed, and the judgment of the district court in favor of the petitioners (defendants below) should be affirmed.

Respectfully submitted,

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